No. 92-1639

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,
Petitioners
v.
ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), exempts a resource recovery facility, which generates a hazardous waste ash residue from its incineration of municipal solid waste, from the requirements of Subtitle C of RCRA applicable to hazardous waste generators.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) following this Court's remand to that court is reported at 985 F.2d 303 (7th Cir. 1993). The initial opinion of the court of appeals (Pet. App. 5a-21a) is reported at 948 F.2d 345 (7th Cir. 1991). The district court's memorandum opinion and order of November 29, 1989 (Pet. App. 22a-33a) is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The court of appeals issued a published opinion on January 29, 1993. The petition for a writ of

certiorari was filed on April 12, 1993. The jurisdiction of this court is invoked under 28 U.S. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. 6921(i), provides:

> **(i) Clarification of household waste exclusion**
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, sorting, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--
>
> (1) such facility--
>
> (A) receives and burns only--
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous waste identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Sections 1004(6) & (7), 42 U.S.C. 6903(6) & (7) provide:

> (6) The term "hazardous waste generation" means the act or process of producing hazardous waste.
>
> (7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

STATEMENT

Respondents Environmental Defense Fund, Inc. and Citizens For A Better Environment brought this action, asserting that petitioner City of Chicago[1] is violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, by failing to comply with that Act's Subtitle C hazardous waste requirements in the City's handling of the hazardous waste ash residue generated by its operation of a municipal solid waste facility.[2] The district court granted the City's motion for summary judgment, agreeing with the City that Section 3001(i) of RCRA exempts the City's resource recovery facility, and the ash generated by it, from Subtitle C's requirements

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[1] Petitioners City of Chicago and Richard M. Daley, Mayor of the City of Chicago, are referred to collectively in this submission as either "the City" or "petitioner."

[2] Subtitle C of RCRA establishes a regulatory scheme governing those "solid wastes" that constitute "hazardous wastes" and Subtitle D imposes a distinct, less rigorous, regulatory regime on "solid wastes" that are not "hazardous." *Compare* 42 U.S.C. 6921-6939 (Subtitle C) *with* 42 U.S.C. 6941-6949 (Subtitle D).

applicable to hazardous waste generators. The court of appeals reversed. This Court subsequently granted a petition for a writ of certiorari filed by the City, vacated the judgment below, and remanded the case to the court of appeals for reconsideration in light of the views expressed by the Administrator of the United States Environmental Protection Agency in a memorandum to regional administrators dated September 18, 1992. On remand, the court of appeals reinstated its earlier judgment.

1. The City of Chicago owns and operates a municipal solid waste resource recovery facility at which it incinerates solid waste collected from households and commercial enterprises located throughout the City. The resource recovery facility receives 200 to 250 truckloads of refuse each day, totalling 350,000 tons of waste per year. The facility in turn generates 110,000 to 140,000 tons of ash, the toxicity of which is routinely high enough to qualify it as a "hazardous waste" subject to the requirements of Subtitle C of RCRA. Between 1981 and 1987, 32 out of 35 samples of ash tested exhibited sufficiently high leachable concentrations of lead, cadmium, or both to be classified a hazardous waste under established EPA testing procedures. Pet. App. 6a.

The City, however, has not in the past, and does not currently comply with Subtitle C in its transportation, storage, or disposal of the hazardous ash. Pet. App. 6a-7a. The City has not, as is required of generators of hazardous waste, applied for and received a United States Environmental Protection Agency identification number prior to engaging in any of these regulated activities with the ash that the City has generated. See 40 C.F.R. 262.12. The City likewise does not purport to comply with packaging and labelling requirements, or with container requirements, applicable to hazardous wastes. See

40 C.F.R. 262.30-33.

Nor does either the waste hauler hired by the City to transport the hazardous ash, or any of the facilities at which the ash has been ultimately disposed, hold a permit to accept hazardous waste. Until 1987, the City sent its ash to a former limestone quarry, which lacked any liner. R12 at ¶ 16.[3] The City currently sends the ash to a sanitary landfill in Michigan that fails to conform with the basic design elements of hazardous waste landfills. R.34 at ¶ 24. Among other shortcomings, there is no double liner or leachate collection and detection system, both of which are required in licensed hazardous waste landfills to guard against the migration of hazardous constituents into any nearby groundwater supplies. *Id.*

2. On January 27, 1988, respondents filed a complaint against the City, alleging that the City was violating Subtitle C of RCRA by unlawfully storing, transporting, disposing, and otherwise handling hazardous ash generated at the City municipal solid waste resource recovery facility. The City filed a motion for summary judgment, relying on RCRA Section 3001(i), which provides that a resource recovery facility that receives and burns only household waste and nonhazardous solid waste from commercial or industrial sources "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" to the extent that the facility is "recovering energy from the mass burning of municipal

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[3] "R12" refers to the item number in the record below. Record cities are derived from the brief filed by respondents in the court of appeals.

solid waste." 42 U.S.C. 6921(i).[4] The City did not contest respondents' claim that the concentrations of hazardous constituents in the ash render it a "hazardous waste," within the meaning of RCRA. Nor did the City contest respondents' assertion that the City was not complying with RCRA's Subtitle C requirements. Pet. App. 6a-7a, 23a-24a.

The district court granted the City's motion for summary judgment. Pet. App. 33a. The court concluded that Congress must have intended to exclude hazardous ash generated by the resource recovery process because in 1980, prior to congressional enactment of Section 3001(i) in 1984, EPA had "exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation." Pet. App. 25a, citing 45 Fed. Reg. 33120 (1980). According to the district court, "Congress having left untouched the EPA's 1980 regulation is persuasive evidence that it intended to exclude ash such as this from Subtitle C." Pet. App. 27a. The court declined to give any deference to EPA's official statement, made subsequent to Section 3001(i)'s enactment, that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." Pet. App. 29a-30a & n.4, quoting 50 Fed. Reg. 28725-28726 (1985).

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[4] Pursuant to Section 3001(i), the facility must not only be a "resource recovery facility," but in addition, the facility owner or operator must have an established program or procedure "to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. 6921(i).

3. The court of appeals reversed. Pet. App. 5a-21a. The court concluded that the district court's reliance on EPA's 1980 regulation was misplaced, because "Congress never ratified th[e 1980] statement in the form of legislation." *Id.* at 10a. Looking to "what the statute actually says," the court of appeals found dispositive that "Section 3001(i) mentions 'the treatment, storing, disposing of or otherwise *managing*' of the household and commercial waste, but fails to include among those activities *generating* a different waste product." *Id.* at 18a (emphasis in original). "It does not follow," the court reasoned, "that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.*

The court also stressed that, "contrary to the City's assertions, 'otherwise managing' and 'generating' are not coextensive terms." Pet. App. 18a. They are each "carefully defined" in a way that prevents them from being "interchangeable." *Id.* at 19a. Hazardous waste "generation" is deliberately excluded from the statutory definition of "management," which is defined "to include a limited number of activities, including the 'collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.'" *Id.*, quoting 42 U.S.C. 6903(7). "It follows, therefore, that if the language of exclusion is limited to 'management' activities of resource recovery facilities, 'generating' activities are subject to regulation." Pet. App. 19a.[5]

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[5] Judge Ripple dissented. Pet. App. 21a.

4. On February 18, 1992, the City of Chicago petitioned (No. 91-1328) for a writ of certiorari. Respondents filed a brief in response that agreed that the writ should be granted, but contended that the judgment of the court of appeals should be affirmed. On May 18, 1992, the Court invited the views of the Solicitor General (112 S.Ct. 1932). In October 1992, the Solicitor General filed a brief recommending that the Court grant the petition, vacate the judgment below, and remand for reconsideration in light of a memorandum dated September 18, 1992, prepared by the EPA Administrator for distribution to regional EPA offices. That memorandum explained that EPA was adopting a new interpretation of Section 3001(i), under which ash generated from the combustion of municipal waste would not be considered subject to RCRA Subtitle C regulation. See Pet. App. 41a-49a.

Both the City of Chicago and respondents filed briefs opposing the Solicitor General's recommendation on the common ground that the court of appeals was not likely to modify its earlier judgment in light of EPA's latest pronouncement. On November 17, 1992, the Court adopted the Solicitor General's recommendation, granted the petition, vacated the court of appeals judgment, and remanded for reconsideration in light of EPA's memorandum. 113 S.Ct. 486 (1992).

5. On remand, the court of appeals reinstated its prior judgment. Pet. App. 1a-4a. According to the court, the "plain language of the statute is dispositive." *Id.* at 3a. The court further explained that "EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers." *Id.* at 2a. Judge Ripple dissented. *Id.* at 3a-4a.

DISCUSSION

The petition for a writ of certiorari should be granted. Although we believe that the judgment of the court of appeals should be affirmed, we agree with petitioner that the decision of that court conflicts with the decision of another court of appeals and that the existing conflict in the circuits presents an important issue of federal law warranting this Court's plenary review.

1. As correctly described by petitioner (Pet. 11), "[t]he Second and Seventh Circuits' interpretations of Section 3001(i) of RCRA remain diametrically opposed." The Seventh Circuit in this case held that Section 3001(i) does not exempt from RCRA Subtitle C's hazardous waste regulations the hazardous ash generated by a municipal resource recovery facility burning household waste and commercial nonhazardous waste. Rather, Section 3001(i) simply exempts the resource recovery facility's management of the household waste it *receives and burns*, notwithstanding the hazardous characteristics of that incoming household waste, as long as the facility operators take appropriate actions to ensure that any commercial or industrial waste mixed with that household waste is not itself hazardous. Where, however, as in this case, the incineration of that waste produces a new waste that itself is "hazardous," within the meaning of RCRA, Subtitle C's requirements apply to that new waste.

The Second Circuit in *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir.), cert. denied, 112 S.Ct. 493 (1991), embraced the opposite view. As described by the Seventh Circuit below, "[t]he Second Circuit * * * concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a

hazardous waste." Pet. App. 8a, citing *Wheelabrator*, 931 F.2d at 213. The Seventh Circuit has in this case squarely rejected the Second Circuit's reasoning in *Wheelabrator* on two separate occasions. See Pet. App. 2a, 5a n.*, 20a.

2. We also agree with petitioner that the regulatory scope of Subtitle C renders "intolerable" a circuit conflict regarding its application (Pet. 13). Subtitle C does not simply impose a set of requirements on geographically localized activities in different states. Subtitle C applies to companies engaged in commerce in hazardous waste treatment, storage, and disposal, much of which crosses state borders. Indeed, the very reason why Congress enacted RCRA and Subtitle C was the predominantly interstate nature of commerce in hazardous waste management. See H.R. Rep. 94-1491, 94th Cong., 2d Sess. 9-10, 24-28 (1976). Congress recognized that "uniformity" was an essential element of any comprehensive scheme designed to protect human health and the environment from the risks presented by such wastes. See *id.* at 30. The conflict between the Second and Seventh Circuits, however, destroys that essential element of the federal statutory scheme.

The existing circuit conflict also presents the kind of conflict that warrants this Court's resolution at this time. There is no reason to suppose that either of the two conflicting circuits may change its view, especially now in the aftermath of the Seventh Circuit's reaffirmation of its initial ruling in respondents' favor. Nor does the fact that Congress is currently contemplating RCRA's amendment in its reauthorization process provide any substantial basis for anticipating that Congress will address this issue in the near future, or indeed at any time. See Pet. 18-19 n.7. Congressional reauthorizations of federal environmental laws are notorious both for their prolonged delays, and the

unpredictability of their substantive amendments in the legislative process. RCRA is itself a good example. Its authorization for appropriations expired five years ago in 1988. See 42 U.S.C. 6916(a) (1988).[6]

3. We also agree with petitioner that this case presents an important issue of federal law warranting this Court's review, wholly apart from the practical problems presented by the conflict now existing between the Second and Seventh Circuits. The environmental consequences at stake, moreover, render this Court's review now particularly pressing.

As petitioner acknowledges (Pet. 3), there were 137 resource recovery facilities operating in the United States as of November 1991, and 68 additional facilities in the planning or construction stage. These facilities generate millions of tons of ash residue each year.[7] The facility at

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[6] Congress similarly needed 13 years (between 1977 and 1990) to reauthorize and amend the Clean Air Act, 42 U.S.C. 7401 *et. seq.*, which was supposed to be reauthorized after only four years. See 42 U.S.C. 7426 (1988).

[7] Petitioner exaggerates, however, the impact of the Seventh Circuit's ruling by wrongly assuming that all municipal incinerator ash would automatically be deemed "hazardous waste" under that court's view. See Pet. 10-11 & n.4. The hazardous nature of petitioner's ash is not disputed in this case, but that does not mean that all municipal incinerator ash will necessarily be hazardous in every case. Whether or not particular incinerator ash is hazardous waste will depend on whether the ash exhibits one of several identifying characteristics. See 42 U.S.C. 6921(a), (g), & (h) (1988). Indeed, the likely effect of an affirmance of the Seventh Circuit's view would be that municipalities will engage in recycling and material-diversion programs to keep toxic materials out of the incinerator and therefore the ash. The upshot might well be that none of the resulting ash will constitute hazardous waste.

issue in this case by itself generates up to 140,000 tons of ash each year. Pet. App. 6a. Under the Second Circuit's view, that ash, no matter how hazardous its composition, is exempt from the stringent requirements that Congress deemed essential for safeguarding human health and the natural environment.[8]

Hazardous ash from resource recovery facilities burning municipal solid waste is therefore currently being stored in a manner not deemed suitable for hazardous waste. The ash is being transported in a way that the government has determined is inadequate for hazardous waste. And, the ash is ultimately being disposed of in a manner that does not meet the minimum requirements

[8] For that reason, moreover, the Second Circuit's view in *Wheelabrator* is doubly flawed. Not only did that court incorrectly conclude that Section 3001(i)'s exemption extends to the generation of hazardous ash, but the court also failed to consider the practical consequences of the regulatory regime that it was creating. Even assuming that the exemption does (contrary to our view) apply to the newly-generated ash, Section 3001(i) cannot fairly be construed as purporting to allow any party other than the resource recovery facility itself to entertain the fiction that the ash is not hazardous waste. The "resource recovery facility recovering energy from the mass burning of municipal solid waste" is the only entity mentioned in Section 3001(i) that "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle." 42 U.S.C. 6921(i). There is no parallel exemption for any other entity that is subsequently "treating, storing, disposing of, or otherwise managing" the hazardous ash. Of course, as petitioner would no doubt respond, such a bifurcated statutory exemption is unworkable and makes no sense (*e.g.*, how would a transporter know that it was receiving a hazardous waste if the Subtitle C manifest system requirements did not apply to the generator of the waste in the first place). But that is the very reason why it is wrong to suppose that Congress intended to extend the exemption to the generation of ash at all.

applicable to the disposal of wastes containing such hazardous constituents. In some instances, the inevitable harms that result from these dangerous practices may be susceptible to some remedial action, albeit at tremendous costs. In many others, however, the damage is likely to be irreversible both in terms of human health and the environment.

To be sure, the Seventh Circuit's favorable ruling reduces somewhat the magnitude of that threat. But, absent this Court's review, there will be no opportunity to challenge the practices of resource recovery facilities operating within the Second Circuit and thereby redress the growing threat that they present to persons exposed to their hazardous wastes. Hence, the seriousness of those risks further counsels against this Court's delaying review of the issue presented in this case.

4. Finally, although we agree that the petition should be granted, we believe that the decision of the court of appeals below is correct and its judgment should therefore be affirmed.

Petitioner's entire legal argument rests on the erroneous proposition that Congress intended to promote resource recovery facility incineration of municipal solid waste (i.e., household waste and nonhazardous commercial waste) in two distinct ways: (1) exempt those facilities from the strict Subtitle C requirements applicable to those transporting, treating, storing, or disposing of hazardous wastes in the facilities' *receipt* of municipal solid waste for the purpose of recovering energy from its mass burning; and (2) exempt those facilities in their *production* of hazardous ash from the strict Subtitle C requirements applicable to those who generate a new hazardous waste,

even when those wastes would otherwise constitute "hazardous wastes," within the meaning of RCRA.

The practical implications of these two possible exemptions are enormously different. The first is not particularly controversial, even though household wastes may include modest amounts of hazardous materials. Because the resource recovery facility incinerates the municipal solid waste that it receives, the human health and environmental risks associated with exempting its mere receipt from Subtitle C are relatively confined both geographically and temporally. The financial savings to the resource recovery facility, however, may be substantial.

By contrast, the human health and environmental risks associated with the second kind of exemption, proposed by petitioner, are far greater in their potential magnitude. Those risks do not end at the resource recovery facility. That is instead where they begin. Under petitioner's reading, the operator of the facility is permitted to treat, store, and arrange for the transport and disposal of a hazardous waste throughout the nation pretending as if it does not contain the hazardous constituents that the waste in fact contains.

We do not question petitioner's claim (Pet. 15-17) that Congress intended to promote resource recovery facilities. And we certainly agree with petitioner's characterization of the waste management issues faced by this country as a "crisis." (Pet. 15). But, as the appellate court concluded (Pet. App. 20a), it would seem "unlikely," if not entirely "absurd," to suppose "that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive

amounts of hazardous waste in the form of ash into ordinary landfills."

It is therefore not surprising that plain meaning of the statutory language of RCRA Section 3001(i) does not support petitioner's proffered construction. Section 3001(i) expressly endorses only the first, relatively confined exemption relating to the receipt of household wastes. It exempts the resource recovery facility from Subtitle C in its receipt and burning of wastes, by providing that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing or, otherwise managing hazardous waste for the purposes of regulation under this subchapter." Omitted from the statutory language is any reference to exempting the facility from Subtitle C requirements applicable to the "generation" of a new hazardous waste in the event that the ash produced contains high levels of hazardous constituents.

Contrary to petitioner's claim, moreover, the reference in Section 3001(i) to "otherwise managing" cannot be reasonably read as embracing "generation." In RCRA, Congress carefully and precisely defined the terms "management" and "generation" in a manner that provides, as the court of appeals explained, for "no overlap whatsoever" (Pet. App. 19a).[9] No doubt Congress did so

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[9] RCRA defines the term "hazardous waste generation" as meaning "the act or process of producing hazardous waste." 42 U.S.C. 6903(6). "Hazardous waste management" is defined to mean "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. 6903(7).

to avoid the very absurdity that petitioner nonetheless insists was the legislature's intent.[10]

5. Finally, petitioner's reliance (Pet. 14-15) on both the EPA's construction of Section 3001(i) and the legislative history is misplaced. Neither defeats the plain, unambiguous meaning of the statutory language.

a. EPA has addressed the meaning of Section 3001(i) only once since its enactment in the kind of official manner that this Court accords deference. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); *cf. Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). In July 1985, soon after congressional passage of Section 3001(i), EPA concluded that it did "not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of a hazardous waste." 50 Fed. Reg. 28726 (July 15, 1985). That was the agency's authoritative view of the new statutory requirements, formulated contemporaneously to the law's passage, based on the statute's language, "legislative history and EPA's views of Congressional purposes for the new requirements." *Id.* at 28703.

To be sure, an Administrator of EPA has since advanced the opposite view. Last September, then-EPA

[10] Petitioner mistakenly assumes that because the *management* of one kind of hazardous waste may result in the *generation* of another kind of hazardous waste that a statutory exemption applicable to the former activity must extend to the latter as well. The short answer is that such an assumption is improper where the two activities trigger distinct statutory requirements directed to different kinds of risks. Notions of proximate cause are no substitute in these circumstances for clear statutory definitions.

Administrator Reilly sent a memorandum to all regional EPA offices in which he announced the agency's decision "to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities * * * as exempt from regulation under RCRA Subtitle C." Pet. App. 41a. Such subsequent agency shifts in view, however, are not "entitled to the deference normally accorded an agency's interpretation of the statute it administers." See Pet. App. 2a; *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"). But, in any event, where, as in this case, "the plain language of the statute is dispositive[,] * * * [t]he public policy arguments [Administrator] Reilly discusses in the memorandum cannot override the mandate of the statute." Pet. App. 3a. See, *e.g.*, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2770 (1990).[11]

b. The legislative history is likewise unavailing to petitioner. Congress was aware, prior to passing Section 3001(i), that EPA had previously created an administrative exemption from Subtitle C for household wastes that purported to extend to the "residues remaining after * * * incineration." 45 Fed. Reg. 33120 (1980). But, as

[11] Apart from public policy arguments better directed to Congress, EPA's principal support for its new view is Congress's use of the term "disposing" in Section 3001(i). Because, EPA claims, the "ash ordinarily is the only waste 'disposed of'" by a municipal resource recovery facility, "Congress arguably intended that [incinerator] ash not be regarded as a hazardous waste." Contrary to EPA's assertion, however, there are substantial quantities of other wastes routinely disposed of by resource recovery facilities, including nonprocessible waste and "bypass waste," which is waste received in excess of capacity or during shutdown for maintenance or repairs.

explained by the court of appeals below, that is the very reason why Congress cannot be deemed to have embraced that same view:

> Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word "generation" was not used in the final product. * * * The actual words of the statute -- the end product of the rough-and-tumble of the political process -- are the definitive statement of congressional intent.

Congress, in short, rejected EPA's 1980 approach in its enactment of Section 3001(i) in 1984.[12]

Finally, Congress has since declined to amend RCRA to allow hazardous municipal incinerator ash to be regulated under the less demanding requirements of

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[12] The court of appeals also well explained why petitioner's reliance on a legislative report's addition of the term "generation" to those activities exempted from Subtitle C is unpersuasive: "Why should we, then, rely upon a single word in a committee report that did not result in legislation. Simply put, we shouldn't." Pet. App. 18a. Of course, we may never know precisely why those committee staffers who drafted the report were apparently unable to muster the support necessary to include "generation" in the statute itself. But where, as in this case, that addition portends such a significant expansion in the scope of Section 3001(i)'s reach, the resulting distinction between statute and report must be dispositive. Significantly, Congress has shown itself capable in the RCRA context of an exemption that, unlike Section 3001(i), expressly extends to the activity of generation. See 42 U.S.C. 6921 note (emphasis added) ("owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating* transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of [Subtitle C]").

Subtitle D.[13] Neither petitioner nor EPA should be allowed to circumvent Congress by unilaterally ignoring the plain meaning of the statutory language Congress enacted.

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[13] Significantly, Congress has repeatedly declined to pass legislation that would permit the disposal of municipal incinerator ash in Subtitle D landfills, even when, unlike the scheme proposed by petitioner and EPA, such permission would be conditioned upon the establishment of a distinct, more exacting regulatory framework applicable under Subtitle D to that specific waste. See *Municipal Incinerator Ash: Hearing on H.R. 2517, 4255, and 4357 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 72 (1988); S. Rep. No. 102d Cong., 2d Sess. 56-60 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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